United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Jerome F. O'Neill

Docket No. 77-1078

Bp/s

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

PAULINE A. STEBBINS

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Pauline A. Stebbins appeals from a judgment and conviction entered on January 14, 1977 after a five-day trial before the Honorable James S. Holden, Chief United States District Judge for the District of Vermont, and a jury.

An indictment, bearing criminal number 77-63 and filed November 9, 1976,* charged defendant Pauline A. Stebbins in

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* Defendant originally was charged in an indictment handed up on September 8, 1976. The superseding indictment contained the same specifications and perjury allegations as the original indictment but the materiality language was more detailed.

one count with perjury before a grand jury in violation of 18 U.S.C. § 1623.

Defendant moved pre-trial for the production of "rough notes under Federal Rules of Criminal Procedure, Rule 16, and 18 U.S.C. § 3500," seeking the exclusion of the testimony of those witnesses for whom such notes were not produced. (R.* 25; DA 20).** The Court heard testimony, considered the arguments of counsel and denied defendant's request for the exclusion of the testimony of Agents Burke, DeCoigne, Axten and Hess.

The trial of Pauline A. Stebbins began on November 29, 1976 and on December 3, 1976 the jury returned a verdict of guilty.

On January 14, 1977 Chief Judge Holden sentenced Pauline A. Stebbins to one year in the custody of the Attorney General with the condition that she be confined in a custodial institution for a period of one (1) month. The execution of the remainder of the sentence of imprisonment was suspended and the defendant was placed on probation for a period of two years to commence upon her release from confinement.

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* R refers to record document. Other references are: TR - Transcript; GA - Government Appendix; DB - Defendant's Brief, entitled "Appellant's Brief" by defendant; DA - Defendant's Appendix, entitled "Appellant's Appendix" by defendant; GX -Government's Exhibit; DX - Defendant's Exhibit.

** The Government's reply memorandum is found at R. 27.

She was further ordered to pay a fine of $2,500 during the first year of probation following imposition of sentence. The sentence of confinement was to commence on February 14, 1977, but was thereafter stayed pending appeal.

STATEMENT OF ISSUE

ARE GOVERNMENT AGENTS WHO TAKE NOTES OF THE SUBSTANCE OF AN INTERVIEW OR WHO TAKE NO NOTES BUT THEN ROUGH DRAFT THEIR REPORT TO ENABLE A TYPIST TO PREPARE THE FINAL FORM OF THE REPORT REQUIRED TO RETAIN THE NOTES AND ROUGH DRAFT REPORT WHERE EVERYTHING IN THE NOTES AND DRAFT ARE CONTAINED IN THE FINAL REPORT

STATEMENT OF FACTS

An information filed on December 27, 1972 in Vermont District Court, Unit No. VI, Windsor Circuit, State of Vermont, reads in part as follows:

> William Paul Stebbins of White River Junction in the County of Windsor at White River Junction in the County of Windsor on, to wit, the 22nd day of December, 1972, did, then and there purposely, and knowingly cause serious bodily injury to another, to wit, Robert Clark Hall, with a deadly weapon in violation of 13 V.S.A. § 1024(a)(2).

(GX* 2; GA 11, 12)

William left town shortly thereafter "when he got wind of there [sic] was going to be a warrant issued against him." (Tr. 510)

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* Government Exhibits 2-9 and 11-18 in this case have a second exhibit sticker on them. The numbers on both stickers are the same in all instances with the exception of GX 14 which bears a defendant's "A" sticker. The second set of stickers reflects the use of these exhibits in a subsequent trial, United States v. William P. Stebbins, D. Vt., No. 76-66.

During William's absence Pauline Stebbins and her husband Hubert arranged for a local attorney, Frank Fucci, to see what could be done for him with respect to the charges. (Tr. 136-38, 182; GA 31-32) Fucci discussed the case with the State's Attorney, Paul Hudson, but initially was unable to obtain a reduction in the charges from a felony to a misdemeanor. (Tr. 140; GA 40; Tr. 183) Fucci then retained attorney Frank Mahady who had been the State's Attorney while Hudson was a deputy, to assist him in trying the case. (Tr. 140; GA 34; Tr. 182-86, 188) Fucci thereafter found an important defense witness and after further negotiations obtained a reduction in the charge to a misdemeanor dispute substantial prejudice in the area against William. (Tr. 183-84, 240-41, 245-46, 465-66)

Fucci arranged through Pauline Stebbins for William to return home and plead to a reduced charge. (Tr. 174-75, 510-15) Fucci had set his fee at $10,000 prior to obtaining the reduced charge, and with the understanding that Mahady would receive one-half of the fee. (Tr. 138-39, 142; GA 32-33, 36; Tr. 155-56, 183) On the morning William Stebbins entered his plea Frank Fucci went to the Polka Dot restaurant, owned by the Stebbins, and received $10,000 in cash from Pauline Stebbins* in a brown paper bag.

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* Fucci testified at trial that William Stebbins also was present that morning, and contrary to what he had previously told an F.B.I. agent and an Assistant U.S. Attorney the previous week. Tr. 155, 165-66.

(Tr. 139-40; GA 33-34; Tr. 147-49, 247, DX B) After lunch Fucci delivered $5,000 of the cash to Frank Mahady at Mahady's office. (Tr. 143; GA 34)

William Stebbins went into Court with Frank Fucci where the charge was reduced to simple assault and he was fined $500 and put on probation. (GX 2, 3; GA 11-13)

A federal grand jury investigation subsequently commenced and on September 4, 1975 the defendant appeared pursuant to a subpoena. (Tr. 32, 64) The grand jury was at that time investigating William Stebbins' illegal drug activity and the possible payment of a large sum of money to an elected official of the State of Vermont in connection with William Stebbins' aggravated assault case. (Tr. 33-34) The purpose in calling Mrs. Stebbins before the grand jury was to ascertain whether Frank Fucci had arranged for large sums of money to be transferred to assist William Stebbins in connection with the case, to determine whether Pauline Stebbins had provided any money on behalf of her son through Frank Fucci to an elected official of the State of Vermont, and generally to determine her connection with the aggravated assault case. (Tr. 34-36)

Mrs. Stebbins' testimony* before the grand jury as it related to the perjury case included statements that

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* The testimony of Mrs. Stebbins before the grand jury was marked as Government's Exhibit No. 1 and was read into the record with the exception of some areas which counsel agreed should be excluded due to her exercise of her Fifth Amendment self-incrimination right before the grand jury.

she knew nothing about her son's personal activities, had nothing to do with obtaining a lawyer for him in the aggravated assault case, did not know how much the legal fees had been and had nothing to do whatsoever with the transfer or payment of any legal fees to Frank Fucci in connection with the case. (Tr. 67-84)

ARGUMENT

GOVERNMENT AGENTS WHO TAKE NOTES OF THE SUBSTANCE OF AN INTERVIEW OR WHO TAKE NO NOTES BUT THEN ROUGH DRAFT THEIR REPORT TO ENABLE A TYPIST TO PREPARE THE FINAL FORM OF THE REPORT ARE NOT REQUIRED TO RETAIN THE NOTES AND ROUGH DRAFT WHERE EVERYTHING IN THE NOTES AND DRAFT ARE CONTAINED IN THE FINAL REPORT.

Defendant has made a significant effort to lump together the factual situations here with respect to the retention of notes by Special Agent Burke of the Internal Revenue Service and Special Agent Axten of the Federal Bureau of Investigation, continually referring to the situations as though identical and describing the paperwork as "rough or field notes." (DB 20, 21, 26. 27) However, the circumstances as brought out through the voir dire before and during the trial indicate that the situations are altogether different. A brief review of the facts illustrates this.

I.R.S. SPECIAL AGENT BURKE

Special Agent Burke and Internal Revenue Service Agent DeCoigne interviewed Mrs. Stebbins on September 18, 1973 at the Polka Dot restaurant. (Tr. 94; GA 17) The interview was approximately 45 minutes long, including part of the time when her son was interviewed also. During the interview only Special Agent Burke took notes. (Tr. 10, 95, 97; GA 15, 18, 20) Special Agent Burke was "generally paraphrasing what was stated," did not take everything down

and did not show the notes to Mrs. Stebbins to look at and go over. (Tr. 97; GA 20) Within three to five days of the interview Special Agent Burke with the assistance of Revenue Agent DeCoigne prepared a "memorandum of contact" concerning the interview.* (Tr. 10-11, 98; GA 15-21, 23; Tr. 100) The memorandum was prepared basically by Special Agent Burke who "styled or drafted an outline of my notes and based on the outline, I dictated the final memorandum into a cassette tape recorder." (Tr. 11, 98; GA 16, 21) Agents Burke and DeCoigne both reviewed the memorandum after it was typed and agreed that the contents correctly reflected what had been said. (Tr. 11, 98-99; GA 16, 21-22) Agents Burke and DeCoigne compared the typed report with the original notes and the outline format, with Agent Burke paying particular attention to dates and amounts, making any necessary changes and then destroying the notes. (Tr. 98, GA 25; Tr. 114) Generally nothing was omitted from the notes as compared to the memorandum of contact. (Tr. 98; GA 21) Both the notes and the memorandum paraphrased what

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* Mrs. Stebbins told the agents, among other things, that she provided her son with all his spending money; that she had put up bail and paid legal fees for him in the past and would continue to do so; that William was always being harrassed by law enforcement officers; and that he received all his meals at the Polka Dot restaurant. Tr. 327-31, 346-49.

was said by Mrs. Stebbins.* (Tr. 97; GA 20; Tr. 100)

F.B.I. SPECIAL AGENT AXTEN

Special Agent Albert O. Axten and John Hess of the F.B.I. interviewed Pauline Stebbins on January 7, 1976 at the Polka Dot restaurant for approximately fifteen minutes.** (Tr. 2-3, 116-17; GA 24-25) Neither Agent took any notes at the time of the interview. (Tr. 3, 117; GA 25) The next day Special Agent Axten himself typed a rough draft form FD 302 which contained the substance of what Pauline Stebbins had said. (Tr. 117-18; GA 25-26) The "rough draft" is not a rough draft of his recollection, but rather a rough draft of the final form which the 302 will take. (Tr. 118; GA 26) Agent Axten typed his own draft 302 rather than dictating it. (Tr. 7, 119; GA 27) He sent the rough 302 to the F.B.I. office in Albany, New York, where a stenographer

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* Defendant claims in her brief that "Agent Burke indicated that he may also have taken substantially verbatim statements from the Appellant. . . ." DB 23. Defendant did not make any transcript citation to support this position and the Government has been unable to find any such language in the transcript. On the contrary, everytime Agent Burke spoke in terms of the use of verbatim statements he indicated it was his practice to use quotation marks, and there were none in the memorandum of contact. Tr. 108; GA 23; Tr. 112, 113, 115.

** Mrs. Stebbins made reference to her previous grand jury testimony, stated that the $10,000 for the fee had come from a Joseph Leary. She further stated that what she told the grand jury was the truth, that she had given her money to Fucci but had not paid him, that she had not denied giving the money to Fucci before the grand jury. Tr. 296, 318.

retyped it. (Tr. 118; GA 26) The rough draft was returned with the copy typed by the stenographer, the two were compared and when the two were found to be exact, the clean copy was initialled and retained and the rough draft was destroyed. (Tr. 118, 122; GA 26, 28; Tr. 127) This is Agent Axten's standard procedure with respect to rough draft 302s. (Tr. 123; GA 29) Agent Hess also reviewed the clean 302 and initialled it since there were no errors or corrections which needed to be made. (Tr. 3, 7-8)

This factual review illustrates the clear distinction between the taking of rough notes in the field as Agent Burke did and the typing up of the rough report form as Agent Axten did. Defendant also has clouded the situation here by reference to the so-called Miller memorandum which is described by defendant as "apparently the F.B.I.'s procedural standard," with no record or other citation to support this assumption. DB. 30.* A careful examination of the record specifically indicates that when Special Agent Axten was asked about the

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* The Miller memorandum was discussed in United States v. Harrison, 524 F.2d 421, 425 (D.C. Cir. 1975) and it appears that defendant has presumed that this memorandum is still in effect based on the Harrison decision one and one-half years ago.

destruction of drafts or notes he indicated it was his procedure to destroy rough drafts, but not notes as is indicated by the following question and answer:

> [Mr. Connolly] Q. So, it's fairly standard procedure for the F.B.I. agents to destroy those?
>
> A. Destroy rough drafts, not notes.

(Tr. 123) No further questions were asked of Special Agent Axten as to the procedure with respect to notes, thus leaving this Court with a record barren of definitive information concerning the procedure presently followed in the F.B.I. with respect to field or rough notes.

This Court has long held that the Jencks Act, 18 U.S.C. § 3500, "imposes no duty on the part of law enforcement officers to retain rough notes when their contents are incorporated into official reports and they destroy the notes in good faith." United States v. Terrell, 474 F.2d 872, 877 (2d Cir. 1973). This position has been reiterated recently. United States v. Anazalone, No. 76-1458 (2d Cir. May 6, 1977) 3398-99. See United States v. Di Stefano, No. 76-1581 (2d Cir. May 16, 1977) 3558 & n.11.

The seventh and fifth circuits also have considered this issue and have reached conclusions which support the actions of the district court in this case. See United States v. Harris, 542 F.2d 1283, 1292-93 (7th Cir. 1976); United States v. Pacheo, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

Even if the notes and rough drafts should have been preserved, there are serious questions as to whether they are "statements" within the meaning of 18 U.S.C. § 3500. See United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Pacheo, 489 F.2d 554 (5th Cir. 1974, cert. denied, 421 U.S. 909 (1975); United States v. Williams, 384 F.2d 488, 493 (2d Cir.), cert. denied, 385 U.S. 836 (1966); United States v. Jones, 360 F.2d 92, 95 (2d Cir. 1966), cert. denied, 384 U.S. 1012 (1967). Cf.

Goldberg v. United States, 425 U.S. 94 (1976)

Defendant also raises a claim of deprivation of rights under Rule 16 as a basis for reversal. However, in the same sense that nothing in the Jencks Act requires the preservation of notes or drafts, neither does Rule 16. The Rule speaks in terms of permitting the defendant:

> to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent. . . .

Fed.R.Cr.P. 16.

As this language illustrates, there is no requirement that any such material be preserved. Further, however, the defendant had a much more complete version of her statements available to her, including everything in the notes and drafts, in the reports turned over pursuant to Rule 16. Since everything from the field notes was included in Agent Burke's memorandum and Agent Axten's clean Form FD 302 was almost literally a copy of the rough draft, the defendant received everything she could have expected under Rule 16 even if she had the notes and rough draft.

The final contention made by the defendant is that the notes and draft constituted potential Brady material. However, since everything in the rough notes or draft 302 was contained in the reports, she received any such material. Mrs. Stebbins also was given a specific opportunity by Judge Holden to raise a Brady claim following the denial of her motion:

> If it should appear that the destruction of the original notes might have contained Brady material or that the defendant was prejudiced by the destruction of notes, the Court will allow you to renew your motion.

(Tr. 133; GA 30) The record fails to show any renewal of the motion thereafter.

The Government is aware of the cases in the ninth and District of Columbia circuits which are contrary to the Government's position here, United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975). The actions of the agents here in preserving in the final report form what was in the notes and rough drafts illustrates why the approach taken in the ninth and District of Columbus circuits is unnecessary.*

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* While Agent Burke would hereafter be required to maintain his field notes under Harris and Harrison, neither of those decisions would prohibit the use of the testimony of Agents Axten, Hess or DeCoigne.

When everything defendant has raised is considered the most that can be said is that two circuits would require Agent Burke, who conducted the interview in 1973, to hereafter preserve his notes. Agents DeCoigne and Hess took no notes but reviewed the final form of the reports ultimately turned over to the defendant. Agent Axten had only a rough draft, which is far different from field notes.

The Government strongly submits that this Court's position as set out in Terrill and recently reiterated should be maintained. The Court may ultimately have facts brought to its attention which cause it to rethink its position. The facts of this case, however, unquestionably are an inadequate foundation for a change in this important precedent.

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* Although defendant tries to undermine the strength of the Government's case, the record does not support this conclusion. Illustrative of this is the defendant's own admissions under cross-examination that Frank Fucci, and Agents Burke, DeCoigne, Hess and Axten were all wrong in important parts of their testimony. Tr. 544-46.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE W.F. COOK
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the District of Vermont
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States of America

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Assistant U.S. Attorneys

June 6, 1977

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v. Docket No. 77-1078

PAULINE A. STEBBINS

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of June, 1977, mailed two copies of the attached Brief and Appendix, and a copy of the Motion for Leave to File Appendix, along with a copy of this Certificate of Service to counsel for Appellant, John Long, Esq., White River Junction, Vermont, postage prepaid.

JEROME F. O'NEILL
Assistant U.S. Attorney